Filed 6/17/19 P. v. Jimenez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JOSE JIMENEZ, Defendant and Appellant.	C083418 (Super. Ct. No. STKCRFDV20160006688)

A jury convicted defendant Jose Jimenez of infliction of corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)),[1] false imprisonment by violence (§ 236), criminal threat (§ 422, subd. (a)), and misdemeanor child endangerment (§ 273a, subd. (b)). The trial court found true the allegations that defendant had a prior strike

---

1 Undesignated statutory references are to the Penal Code

conviction (§§ 667, subd. (b), 1170.12, subd. (b)), and a prior serious felony conviction (§ 667, subd. (a)). The trial court sentenced defendant to serve 11 years in state prison for the felony convictions and applied credit for time served for the misdemeanor conviction.

On appeal, defendant contends (1) recorded conversations of calls placed by defendant from jail to the victim were erroneously admitted into evidence as adoptive admissions, (2) insufficient evidence supports his conviction of child endangerment, (3) the five-year serious felony enhancement must be stricken because it was imposed consecutive to an offense that is not a serious felony, and (4) section 654 requires that the sentence for his conviction of criminal threat be stayed because the sentence was based on the same conduct as the conviction for infliction of traumatic injury on a spouse or cohabitant. The Attorney General observes the one-year sentence for the section 667.5, subdivision (b), prior prison enhancement must be stricken because the record does not establish the trial court actually found he served a prior prison term. On our own motion, we asked the parties to brief the issue of whether defendant's five-year sentence enhancement for the prior serious felony conviction must be stricken under Senate Bill 1393 (2017 - 2018 Reg. Sess.) Statutes 2018, chapter 1013, sections 1, 2 (SB 1393).

We conclude defendant's voluntarily initiated telephone conversation with the victim did not involve any indicia that he relied on his constitutional right to remain silent. The evidence of defendant's violence around his infant daughter amply supports his conviction of child endangerment. The trial court did not err in imposing the sentence enhancement under section 667, subdivision (a), based on defendant's status as a repeat offender. Section 654 does not apply to stay defendant's conviction of issuing a criminal threat because he had a different purpose in threatening the victim not to leave him than in his infliction of physical violence on her. We strike the prior prison enhancement

under section 667.5, subdivision (b), based on a finding not actually made. Finally, we remand this matter with instructions that the trial court consider exercising its newly conferred statutory discretion to consider whether to dismiss defendant's sentence enhancement for his prior serious felony conviction.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

On May 15, 2016, defendant and the victim lived together with their 10-month-old daughter in Stockton. On that day, the victim discovered text messages between defendant and another woman. The victim was angry because she believed defendant was cheating on her. While in their bedroom, she confronted him about the text messages. Defendant was still asleep when the victim started yelling at him and threw his phone at him. The victim ran around the house gathering defendant's belongings to throw them out. An argument ensued in their bedroom. At some point, the victim sent a text message to her brother that defendant was hitting her and that her brother needed to call the police.

City of Stockton Police Officer Mark Afanasev responded to the scene along with a second officer. As he approached the house, Officer Afanasev observed "the front door opened and the victim ran out, crying, and was running right towards us . . . . She was running right directly at us, crying hysterically." As she was running, the victim said: "My boyfriend is beating me up." Office Afanasev was wearing a body camera that recorded the incident. The recording was played for the jury. Officer Afanasev saw that the victim "had three red marks on her neck, two on her right side, and one on her left side. She had two scratches on her right forearm, . . . one of which was bleeding. She had a scratch on her right knee which was also bleeding." The officer offered her an emergency protective order, and the victim responded that "she would like one."

On the recording taken by Officer Afanasev's body camera, the victim explained that defendant "threw me against the headboard and literally it broke – how hard he threw me and, um, he threw me against our, um closet, walls 'cause they're all broken and, uh, he started beating me up. And I believe even one of the neighbors came by and checked because I was screaming so loud." She also stated the defendant choked her and said, "You stupid bitch. You're gonna die before you leave me." Their daughter was sleeping on the bed during defendant's assault on the victim.

The victim told Officer Afanasev the violence ended when defendant "took everything from me. He took my phone, my wallet, my car keys 'cause I was trying to leave . . . ." Defendant lay down to sleep and the victim sent the text to her brother to call the police. Officer Afanasev testified he entered the bedroom and found: "The footboard was completely broken off from the bed, and the part where it used to be attached, it appeared fresh. The closet doors were ripped off of the tracks, and the tracks, the g[o]uge marks from the wheels were fresh in the metal too, so it must have been ripped off recently, and there was a lot of items thrown around the bedroom. It appeared to be a mess."

During her testimony at trial, the victim recanted. She testified that defendant had not been violent, caused her injury, or prevented her from leaving the house that day. She characterized her injuries as "hickey marks, or bite marks on [her] neck." She admitted she did not have the other scratch marks prior to that evening and offered no explanation for their origin. The victim testified she and defendant fell on to the bed as she was "trying to collect all his stuff and get him out of the house." She could not recall the manner in which she and/or defendant fell onto the bed. The victim "was not sure" how the closet doors got damaged.

The victim stated that, during the argument, their daughter was sleeping on the bed "high on the pillows." The daughter was on the bed when the footboard broke.

On cross-examination, the victim stated the district attorney forced her to testify. After the victim told the district attorney the charges against defendant were not true, she was visited by Child Protective Services, which indicated that if she was not cooperative her child would be taken away. In response to this testimony, the prosecution called City of Stockton Police Sergeant Larry Lane – the sergeant assigned to the family crimes unit. Sergeant Lane testified that the prosecutor had never asked him to make a referral to Child Protective Services. The prosecution also called Charlotta Royal, a social worker with Child Protective Services in San Joaquin County. Royal testified she investigated the welfare of the victim and defendant's daughter but never told the victim her daughter was going to be taken away.

While defendant was in jail, he placed several telephone calls to the victim. Three phone calls were played for the jury. The first call included the following exchange:

"Defendant: Just want to hurry up and come home to you babe.

"The victim: (inaudible) You shouldn't hit people.

"Defendant: What?

"The victim: I said well you shouldn't hit people.

"Defendant: (inaudible) I love you babe.

"The victim: Huh?

"Defendant: I said I love you babes. I love you both."

The second phone call included the following:

"Defendant: But what I was thinking too, I don't know, I do want to get out of here so bad, but I don't know.

"The victim: Well, you shouldn't be hitting people.

"Defendant: Well, people shouldn't be attacking me.

"The victim: Wouldn't be in that predicament. So shut the fuck up.

"Defendant: Shut up. Anyways, like I said, we'll see what happens on Monday."

During the third phone call, the parties discussed the following:

"Defendant: Hopefully, you'll get me out of here that same day and shit.

"The victim: Bye. You can go stay at your mom's house.

"Defendant: No I'm not.

"The victim: Yes you are."

"Defendant: I'm going home to my baby.

"The victim: Well you can take your daughter to your mom's house too.

"Defendant: You better stop or you're gonna get a fat one.

"The victim: Oh, and then you'll end up back in county.

"Defendant: You shut the fuck up.

"The victim: That simple.

"Defendant: You're retarded.

"The victim: You're retarded.

"Defendant: How am I retarded?

"The victim: Cause I fuckin said so.

"Defendant: No.

"The victim: You think you're just gonna get out and everything's gonna be gravy and everything's gonna go back to the way it was?

"Defendant: I'm not saying right away, now, am I?

"The victim: Huh?

"Defendant: I'm not saying it's gonna be right away, now, am I?

"The victim: No, that's what I'm thinking, you're gonna go back to your mama's house.

"Defendant: No I'm not.

"The victim: Yes you are.

"Defendant: No I'm not."

Later during the third phone call, the victim complained about a surprisingly large cell phone bill which led to the following discussion:

"Defendant: See if I wasn't in here, I would have been paying that shit off already.

"The victim: What?

"Defendant: I said, if I wasn't in here, we could have paid that off."

"The victim: Yeah, well, if you wouldn't have hit me, you wouldn't have been in there.

"Defendant: Hmm.

"The victim: Exactly.

"Defendant: I didn't. I'm innocent. I love your ass."

The prosecution also introduced evidence that defendant had previously engaged in domestic violence. The first victim testified she was in a dating relationship with defendant in 2008. She stated: "I had gone over to [defendant's] parent's house and we were speaking about him visiting the children, and as I was leaving he tried to hold me down, and then it got into a physical fight, and he got me by his two hands on my neck." Defendant left marks on the first victim's neck. In September 2008, the first victim's phone "was ringing like crazy and either I was getting phone calls and text message of threats from him." In October 2008, defendant called the first victim and threatened to kill her entire family – including children – in front of her.

Defense Evidence

The defense called David Duley, an investigative assistant with the San Joaquin County District Attorney's Office. During an interview, the victim told Duley that defendant never forcibly kept her from leaving. Duley, however, noted the victim did say defendant stood in her way "so she couldn't get out."

Called on behalf of the defense, the victim denied defendant had choked her. She testified she has previously told the District Attorney: "I didn't want to press charges on [defendant] and that I had not been honest about everything that I had said that night."

DISCUSSION

I

Defendant's Statements to the Victim on Telephone Calls He Placed from Jail

Defendant contends the trial court erred in admitting into evidence, as adoptive admissions, several statements he made during telephone calls he placed from jail. Specifically, he argues the statements were admitted in violation of his right to silence under the Fifth Amendment and Evidence Code section 1221. We disagree.

A.

The Calls Placed by Defendant

According to the probation officer's report, City of Stockton police officers arrested defendant and gave him a *Miranda* advisement. (*Miranda v. Arizona* (1966) 384 U.S. 436, 16 L.Ed.2d 694 (*Miranda*).)

The record shows defendant initiated each of the three phone calls introduced as evidence of an adoptive admissions. At the outset of each phone call, a recording announced the call was from "[a]n inmate at San Joaquin County Jail. This call is subject to recording and monitoring."

Defense counsel objected to the admission of the recordings as inadmissible under *Miranda* because they represented post-accusation silence by defendant. Defense counsel further relied on the Fifth Amendment and *People v. Medina* (1990) 51 Cal.3d 870 (*Medina*) in objecting to the recordings. With limitations placed on the extent of the recordings that could be played for the jury, the trial court overruled the objection.

During closing arguments, the prosecutor argued defendant's responses to the victim's accusations constituted adoptive admissions.

B.

Adoptive Admissions

Evidence Code section 1221 codifies the hearsay exception for adoptive admissions by providing that "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his [or her] adoption or his[or her] belief in its truth." Silence in response to an accusation can also constitute an adoptive admission. The California Supreme Court has explained that " '[i]f a person is accused of having committed a crime, under circumstances which fairly afford him[or her] an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he [or she] was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he [or she] fails to speak, or he [or she] makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." (*People v. Cruz* (2008) 44 Cal.4th 636, 672, quoting *People v. Preston* (1973) 9 Cal.3d 308, 313-314.)

In *Medina*, *supra*, 1 Cal.3d 870, our Supreme Court held that "once *Miranda* warnings have been given, it *may* be constitutionally improper to introduce evidence of an accused's postarrest silence." (*Id.* at p. 890, italics added.) *Medina* involved a challenge to the admissibility of a conversation between the defendant and his sister that took place during a jailhouse visit. (*Id.* at p. 889.) The sister asked Medina, "why did you have to shoot those three poor boys?" (*Ibid.*) Medina initially made no response, then later indicated he did not wish to discuss the matter, and then finally told his sister "that 'every dog has his day, every cat has his night,' and he mentioned the Bible and the

Book of Revelations." (*Id.* at p. 889.) The *Medina* court held there was no error in admitting these statements as evidence of an adoptive admissions. (*Id.* at p. 890.) The Supreme Court noted there was no indication Medina had received a *Miranda* advisement or that he believed the conversation was being monitored. (*Id.* at p. 890.) The *Medina* court concluded that "although as previously indicated the use of the adoptive admissions rule may be unwarranted in some situations, including some custodial interrogations, we see no valid constitutional objection to its application in cases where the defendant reasonably could be expected to respond to, and deny, the accusatory statement." (*Id.* at p. 891.)

The *Medina* court delineated the scope of its holding by explaining: "We are not here concerned with, and do not address, the situation in which an in-custody, Mirandized, suspect is confronted with an accusatory statement in circumstances where he may be presumed to suspect the monitoring of his conversation. We do not decide whether, in such circumstances, application of the adoptive admissions rule would be unfair, essentially requiring the defendant to respond to avoid an adverse inference of guilt if he [or she] remains silent." (*Medina, supra,* 51 Cal.3d at p. 891.) This case presents the issue left open in *Medina* because the evidence in this record shows defendant had received a *Miranda* advisement and may be presumed to have known he was being monitored because a recording so advised at the beginning of each of his phone conversations with the victim. Even so, decisions by the United States Supreme Court on in-custody silence in response to accusations provide clear guidance that compel us to conclude the trial court did not err in admitting the telephone conversations placed by defendant from jail.

In *Miranda*, the United States Supreme Court considered "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to

compel him [or her] to speak where he [or she] would not otherwise do so freely." (384 U.S. at p. 467.) Following *Miranda*, the United States Supreme Court further explored the constitutional right to silence in *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (*Doyle*). In *Doyle*, the United States Supreme Court held that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Id.* at p. 618.) Thus the prosecutor in *Doyle* violated the defendant's rights by relying on the defendant's silence at the time of arrest and immediately after a *Miranda* advisement as evidence of guilt. (*Id.* at pp. 617-619.)

Miranda and *Doyle* address the rights of suspects during custodial interrogations. "Custodial interrogation means ' "questioning initiated by law enforcement officers after a person has been taken into custody. . . .' " (*Illinois v. Perkins* (1990) 496 U.S. 292, 296, quoting *Miranda*, *supra*, 384 U.S. at p. 444.) In contrast to custodial interrogations, questions and accusations initiated by private parties do not implicate the same constitutional safeguards. "The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he [or she] believes to be a fellow inmate. Coercion is determined from the perspective of the suspect." (*Illinois v. Perkins*, *supra*, at p. 296.) Thus, the United States Supreme Court rejected "the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent." (*Id.* at p. 297.) Consequently, "[a] private citizen is not required to advise another individual of his [or her] rights before questioning him [or her]. Absent evidence of complicity on the part of law enforcement officials, the admissions or statements of a defendant to a private citizen infringe no constitutional guarantees." (*People v. Mangiefico* (1972) 25 Cal.App.3d 1041, 1049.)

Nonetheless, it is possible to expressly invoke the constitutionally guaranteed right to silence in a conversation only among private parties. "The mere fact that defendant's silence was exhibited to a private party rather than in response to police questioning does not necessarily preclude a constitutional violation [by introducing the lack of response as evidence of guilt]. '[E]ven outside the context of custodial interrogations, silence remains constitutionally protected if it appears to be an assertion of the right to remain silent.' (*People v. Jennings* (2003) 112 Cal.App.4th 459, 473, fn. 2.) [Consequently,] we must examine 'the circumstances surrounding defendant's post-Miranda silence. *Doyle* need not apply to defendant's silence invoked by a private party absent a showing that such conduct was an assertion of his [or her] rights to silence and counsel. [Citation.] On the other hand, when the evidence demonstrates that defendant's silence in front of a private party results primarily from the conscious exercise of his [or her] constitutional rights, then *Doyle* should apply.' " (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1556, quoting *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520.)

C.

Defendant Did Not Rely on His Constitutional Right to Remain Silent

Here, the statements introduced as adoptive admissions were not made by defendant during the course of a custodial interrogation. True, defendant had previously received a *Miranda* advisement. However, defendant's statements regarding the allegations of domestic abuse were not made in response to questioning by police officers. Instead, the accusations were made by the victim without prompting or input from any law enforcement officer. Moreover, it was defendant who initiated the conversations with the victim by placing each of the recorded telephone calls.

Defendant recognizes his conversations with the victim did not constitute custodial interrogations by law enforcement personnel. Consequently, he frames the argument as one of invoking his right to silence after hearing the jail recording that advised him of the

recording and monitoring of the call. The problem with defendant's argument is that he did not invoke his right to remain silent. There is no indication he relied on his rights under the Fifth Amendment, stated he was following the advice of counsel, or gave any other indication he was availing himself of any constitutional rights in the face of the victim's accusations. Indeed, defendant did not remain silent. In essence, defendant "has pointed to nothing in the record that shows that his evasiveness was a 'conscious exercise of his constitutional rights . . . .' " (*Eshelman, supra*, 225 Cal.App.3d at pp. 1520-1521.) The trial court correctly rejected the objection raised by defense counsel that the adoptive admissions could not be admitted into evidence without violating defendant's Fifth Amendment rights.

II

Child Endangerment

Defendant contends his conviction for misdemeanor child endangerment was not supported by substantial evidence. We reject the contention.

A.

Substantial Evidence Standard of Review

When presented with a claim of insufficient evidence, we examine the entire record to assess whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Thus, "we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. ([*People v.*] *Boyer* [(2006)] 38 Cal.4th [412,] 480.) 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we

look for substantial evidence. [Citation.]' ([*People v.*] *Maury* [(2003) 30 Cal.4th 342,] 403.) A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)" (*Zamudio, supra*, at p. 357.)

B.

Section 273a

Defendant was convicted of misdemeanor child endangerment under section 273a, subdivision (b). Subdivision (b) of that section provides: "Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."

Regarding the offense of child endangerment, this court has previously explained that "[s]ection 273a encompasses a wide variety of situations and includes both direct and indirect conduct. (*People v. Smith* (1984) 35 Cal.3d 798, 806; see *People v. Valdez* (2002) 27 Cal.4th 778, 786–787 (*Valdez*).) When the harm to a child is directly inflicted, the requisite mental state for the section 273a offense is general criminal intent. (*Valdez, supra*, 27 Cal.4th at p. 786; [*People v.*] *Sargent* [(1999)] 19 Cal.4th [1206,] 1215-1216, 1222, 1224 [general criminal intent is the intent to do the proscribed act].) When that harm is indirectly inflicted, the requisite mental state is criminal negligence. (*Valdez, supra*, 27 Cal.4th at pp. 781, 786–791; see also § 20 [in every crime there must exist act and intent, or act and criminal negligence].) Criminal negligence is aggravated, culpable, gross or reckless conduct that is such a departure from that of the ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard

for human life. (*Valdez, supra*, 27 Cal.4th at p. 783.) A defendant may be deemed to be criminally negligent if a reasonable person in his [or her] position would have been aware of the risk. (*Ibid*.)" (*People v. Burton* (2006) 143 Cal.App.4th 447, 454.)

C.

The Danger Created by Defendant

In arguing insufficiency of the evidence, defendant asserts the evidence to have been insufficient because the victim denied during her trial testimony that defendant threw her onto the bed. However, when viewed in the light most favorable to the judgment, we conclude evidence at trial sufficed to convict defendant of misdemeanor child endangerment. The evidence showed defendant was both extremely angry and extremely violent toward the victim. Defendant threw her against the bed with such force that the footboard broke. He also threw her against the closet doors with enough force that they too broke. The responding officer testified there were "lots" of items that had been thrown around the bedroom. In the midst of defendant's acts of violence, his child was lying on the bed. The mere fortuity the child was not harmed by the broken bed, the broken closet doors, or even the victim as she was thrown and beaten by defendant does not exonerate him from misdemeanor child endangerment. Instead, the evidence supported a finding that defendant willfully endangered the child who was located in the same area where he committed his violence against the victim.

III

Enhancement under Section 667, Subdivision (a)

Defendant next argues his sentence enhancement under section 667, subdivision (a), must be stricken because it may be imposed consecutively only to a current conviction that is also a serious felony. We disagree.

A.

Sentence

As noted above, defendant was convicted of infliction of corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)) and criminal threat (§ 422). The trial court found true the allegation that defendant had a prior serious felony within the meaning of section 667, subdivision (a)(1). At sentencing, the court imposed the five-year term on section 667, subdivision (a), enhancement consecutive to defendant's aggregate six-year term imposed for infliction of corporal injury on a spouse or cohabitant. And the trial court imposed a concurrent term of four years for the criminal threat conviction.

B.

Sentence Enhancements

As the California Supreme Court has explained, "Section 1170.1 refers to two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions – authorized by sections 667.5, 667.6 and 12022.1 – are of the first sort. The second kind of enhancements – those which arise from the circumstances of the crime – are typified by sections 12022.5 and 12022.7: was a firearm used or was great bodily injury inflicted? Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*People v. Tassell* (1984) 36 Cal.3d 77, 90 (*Tassell*), overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401; accord *People v. Sasser* (2015) 61 Cal.4th 1, 6 (*Sasser*).)

The pertinent statute in this case – section 667, subdivision (a) – provides that "[a]ny person convicted of a serious felony *who previously has been convicted of a serious felony in this state* or of any offense committed in another jurisdiction which

includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (Italics added.) The italicized portion of section 667, subdivision (a), establishes that the five-year enhancement is based on a defendant's status as a repeat offender rather than the characteristics of the current offense. As explained in *Tassell*, enhancements predicated on the defendant's status "have nothing to do with particular counts but . . . are added only once as a step in arriving at the aggregate sentence." (*Tassell*, *supra*, 36 Cal.3d at p. 90.)

C.

Defendant's Five-year Sentence Enhancement

In this case, the trial court correctly imposed a single five-year enhancement under section 667, subdivision (a), on defendant's aggregate sentence. (*Sasser*, *supra*, 61 Cal.4th at p. 7 ["[T]he prior serious felony enhancement may be added only once to multiple determinate terms imposed as part of a second-strike sentence"].) And the five-year enhancement was properly ordered to run consecutively to defendant's aggregate six-year term. (§ 667, subd. (a); *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1047 (*Valencia*).)

We reject defendant's contention the trial court erred by imposing the five-year sentence because one component of his aggregate sentence, i.e., the six-year sentence for the conviction of corporal injury on a cohabitant, was not a serious felony. Another component of defendant's aggregate sentence, a four-year sentence for issuing a criminal threat, does involve a serious felony conviction. (§ 1192.7, subd. (c)(38).) Defendant's status as a second-strike offender combined with his current serious felony conviction renders the five-year sentence enhancement of section 667, subdivision (a), applicable to him. There is no need for the enhancement to attach to any particular count because the

nature of the sentence enhancement is that it applies to defendant's status rather than a particular offense. (*Tassell*, *supra*, 36 Cal.3d at p. 90.) Consequently, the trial court properly imposed the sentence enhancement under section 667, subdivision (a).

IV

Stay of Criminal Threat

Defendant next contends section 654 requires a stay of his sentence for criminal threat (§ 422) because it "arose out of an indivisible course of conduct for" his infliction of corporal injury on a cohabitant. We disagree.

A.

Section 654

Section 654, subdivision (a), provides in pertinent party that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." In reviewing a challenge to the trial court's imposition of separate sentences for conduct asserted to be indivisible, we engage in a two-step test. (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312 (*Corpening*).

The two-step test under section 654 based on the recognition that the statute's "reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective." (*Corpening, supra,* 2 Cal.5th 307.) "We first consider if the different crimes were completed by a 'single physical act.' ([*People v.*] *Jones* [(2012)] 54 Cal.4th [350,] 358.) If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives. (*Id*. at p. 359; see also *People v. Mesa* (2012) 54

Cal.4th 191, 199 (*Mesa*) [‘Our case law has found multiple criminal objectives to be a predicate for multiple punishment only in circumstances that involve, or arguably involve, multiple acts’].) At step one, courts examine the facts of the case to determine whether multiple convictions are based upon a single physical act. (See *Mesa, supra*, 54 Cal.4th at p. 196.) When those facts are undisputed—as they are here—the application of section 654 raises a question of law we review de novo.” (*Corpening, supra,* 2 Cal.5th at pp. 311-312.)

Step two of the analysis under section 654 requires us to consider whether the offenses involve multiple intents and objectives. (*Corpening, supra,* 2 Cal.5th at p. 311.) When, as here, “a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective.” (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) “ ‘A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.’ ” (*Ibid.,* quoting *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

B.

Defendant’s Acts Against the Victim

Defendant committed separate acts with separate intents in inflicting corporal injury on the victim and issuing a criminal threat against her. Defendant violated section 273.5, subdivision (a), by throwing her against the footboard of the bed and the doors of the closet, choking her, and hitting her. Defendant’s intent was to inflict immediate physical injury on the victim. By contrast, defendant’s act and intent in violating section 422 was different. Defendant threatened to kill the victim “before [she] left him.” Rather than inflict immediate violence, defendant’s purpose in threatening the victim was

to inflict sustained fear. For these separate acts and intents, the trial court committed no error in sentencing defendant without applying a stay of sentence under section 654.

V

Section 667.5, Subdivision (b)

The abstract of judgment indicates the trial court imposed a one-year sentence enhancement under section 667.5, subdivision (b), and then stayed that enhancement.

The Attorney General points out that "it is not clear from the record that the prior prison term enhancement allegation was actually found true by the court, as the court only makes mention of [defendant]'s 'prior conviction' during the court trial on the priors." On this basis, the Attorney General suggests that in the absence of any finding defendant actually served a prior prison term, the enhancement must be stricken. We agree.

Neither the minute order nor the reporter's transcript for the sentencing hearing contain any indication the trial court found true the allegation defendant had served a prior prison term. However, section 667.5, subdivision (b), requires that the trial court make a finding as to any "prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony" before it may add the one-year enhancement to a prison sentence. (Cf. *People v. Walker* (2001) 89 Cal.App.4th 380, 383 [trial court must make proper finding on truth of allegations supporting sentence enhancement].) In the absence of an actual finding by the trial court that defendant served a prior prison term within the meaning of section 667.5, subdivision (b), we strike the sentence enhancement imposed under that statute.

VI

Senate Bill 1393

On our own motion, we requested supplemental briefing on the issue of whether this case must be remanded to the trial court with directions to resentence defendant under the discretion newly granted by sections 667, subdivision (a)(1).

Defendant's sentence includes a five-year enhancement imposed under section 667, subdivision (a). At the time of defendant's sentencing, trial courts lacked authority to strike a prior serious felony conviction for purposes of the sentence enhancement under section 667, subdivision (a)(1). (See *Valencia, supra*, 207 Cal.App.3d at pp. 1045-1048 [trial court previously barred from exercising discretion to strike prior felonies for purposes of enhancements imposed under section 667].) However, SB 1393 amended section 667, subdivision (a), with the effect that the trial court may now exercise discretion to strike a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

As non-urgency legislation, SB 1393 became effective on January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a).) Thus, the question arises whether the amendment of section 667, subdivision (a), applies retroactively to defendant's sentence in this case. In their supplemental briefing, defendant and the Attorney General advance the position that SB 1393 applies retroactively in this case. This position is meritorious.

"When an amendatory statute either lessens the punishment for a crime *or*, as [SB 1393] does, ' "vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty," ' it is reasonable for courts to infer, absent evidence to the contrary and as a matter of statutory construction, that the Legislature intended the amendatory statute to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective. (*People v.*

Superior Court (*Lara*) (2018) 4 Cal.5th 299, 307-308 & fn. 5; *People v. Francis* (1969) 71 Cal.2d. 66, 76) (['[T]here is such an inference because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances']; *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [absent evidence of contrary legislative intent, 'it is an inevitable inference' that the Legislature intends ameliorative criminal statutes to apply to all cases not final when the statutes become effective]; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507 ['Retrospective application of a new penal statute is an exception to the general rule set forth in section 3, which bars retroactive application of new Penal Code statutes unless the Legislature has expressly provided for such application'].)" (*Garcia*, *supra*, 28 Cal.App.5th at p. 972.)

Here, defendant's conviction was not final when SB 1393 took effect. Accordingly, we remand the matter for the trial court to exercise its discretion as now authorized under section 667, subdivision (b).

DISPOSITION

Defendant's convictions are affirmed. Defendant's prior prison enhancement imposed under Penal Code section 667.5, subdivision (b), is stricken. The matter is remanded with instructions that the trial court exercise its sentencing discretion under the recent amendment of Penal Code section 667, subdivision (a)(1), to consider whether to dismiss defendant's sentence enhancement imposed under Penal Code section 667, subdivision (a)(1), for his prior serious felony conviction. After the trial court has exercised its discretion under Penal Code section 667, subdivision (a)(1), the clerk of the superior court shall prepare an amended abstract of judgment to conform to this opinion and any sentencing change the trial court might make,

and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
RENNER, J.